



GSA Chief FOIA Officer

June 18, 2012

Mr. Jason Smathers
MuckRock News
DEPT MR 835
P.O. Box 55819
Boston, MA 02205-5819

Dear Mr. Smathers:

This is in response to your Freedom of Information Act (FOIA) appeal (GSA number 219448) received by the U.S. General Services Administration (GSA) on May 1, 2012. In your appeal, you disagreed with GSA's National Capital Region's withholding of 90 email documents pursuant to the sixth exemption of FOIA, 5 U.S.C. 552(b)(6).

After reviewing your appeal, GSA's previous response, and the documents, I decided the previous decision was correct and I am withholding the emails. The emails in question were either sent or received by GSA employees, but they were not related to the employees' work. They were email communications with non-GSA individuals that simply made some mention of the incident that occurred in the restroom at the regional office building.

Even though the communications were sent from or received by Government email addresses through a GSA system using Government computers, that is not dispositive of the situation. GSA Order 7800.11A, *Personal Use of Agency Office Equipment*, allows employees' limited personal use of agency office equipment.

The purpose of FOIA is to shed light on the Agency's performance of its statutory duties. *Dept. of Justice v. Reporters Committee for Freedom of Press*, 489 U.S. 749, 773 (1989). FOIA applies only to Government records. *John Doe Agency v. John Doe Corp.*, 493 U.S. 146 (1989). Agency records must be created or obtained by the agency and under the Agency's control. *Dept. of Justice v. Tax Analysts*, 492 U.S. 136, 144-145 (1989). The courts have identified a four part test to determine if an agency has control over records. See *Burka v. HHS*, 87 F.3d 508 (D.C. Cir 1996). Personal records are different from agency records and are not subject to FOIA, and an agency should look at the totality of the circumstances regarding creation, maintenance, and use of the record. *Bureau of National Affairs, Inc. v. Dept. of Justice*, 742 F.2d 1484 (C.A.D.C. 1984).

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Considering that the communications at issue were between GSA employees and non-GSA individuals and did not relate to the GSA employees' jobs, I find these are not GSA records subject to FOIA.

Even if these are GSA records, the sixth exemption protects records the release "of which would be a clearly unwarranted invasion of personal privacy." 5 U.S.C. 552(b)(6).


For records to be protected under the sixth exemption, the privacy interest is balanced against the public interest. *Dept. of State v. Ray*, 502 U.S. 164 (1991). The only relevant public interest to consider is the extent the purpose of FOIA is furthered (i.e., contributing significantly to the public's understanding of the operations or activities of the agency). *Dept. of Defense v. Federal Labor Relations Board*, 510 U.S. 487, 195 (1994). If there is no public interest in the records, withholding the records is proper, even if the privacy interest is modest. *Seized Property Recovery, Corp. v. U.S. Customs and Border Protection*, 502 F.Supp.2d 50, 56 (D.D.C. 2007).

Since these were private communications between GSA employees and their friends or families, there is a privacy interest in keeping those communications out of the public eye. There is no public interest in those emails as they did not relate in any way to the employees' jobs nor do they shed light on how GSA performed its statutory missions. Therefore, even if these are agency records, the privacy interest of the employees with respect to the emails outweighs the lack of any public interest in the records, so the documents are protected under the sixth exemption of FOIA, 5 U.S.C. 552(b)(6).

This letter constitutes the GSA's final determination of your appeal. You have the right to seek judicial review of this determination in the United States District Court in the District in which you reside, have your principal place of business, in the District of Columbia, or where the records are located.

As an alternative to litigation, the Office of Government Information Services (OGIS) has been created under the 2007 FOIA amendments. OGIS was created to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. Using OGIS services does not affect your right to pursue litigation. You may contact OGIS by writing to the Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road, Room 2510, College Park, MD 20740, via email at ogis@nara.gov, or by phone at (877) 684-6448.

Sincerely,


Cynthia A. Metzler
Chief FOIA Officer